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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 CANNISTRA REALTY,

4 Plaintiff,

5 v.

19 CV 3558 CS

6 UNITED STATES EPA, et al.,

7 Defendants.

8 -----x

9 United States Courthouse
White Plains, N.Y.
10 December 13, 2019
10:20 a.m.

11 Before:

12 THE HONORABLE CATHY SEIBEL,

13 District Judge

14 APPEARANCES

15 KEANE & BEANE

Attorney for Plaintiff Cannistra Realty

16 EDWARD J. PHILLIPS

17 UNITED STATES ATTORNEYS OFFICE - SDNY

Attorneys for Defendant United States EPA, et al.

18 EMILY ELIZABETH BRETZ

MARGOT LUDMER

19 SCARINCI & HOLLENBECK

20 Attorney for Weston Solutions, Precision Environmental

21 JOHN SCAGNELLI

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1 (In open court)

2 THE DEPUTY CLERK: In the matter of Cannistra.

3 MR. SCAGNELLI: John Scagnelli, from Scarinci &
4 Hollenbeck, for Weston Solutions, Inc. and Precision
5 Environmental.

6 THE COURT: They're a subpoenaed party?

7 MR. SCAGNELLI: That's correct.

8 MS. LUDMER: Margot Ludmer, L-U-D-M-E-R.

9 THE COURT: Thank you all for coming early. You can
10 all have a seat. All right. I have many letters, but it
11 sounds like they're mainly -- there are really two issues. So,
12 let's talk first about -- let's talk first about the
13 plaintiff's desire to depose the EPA's decision-maker
14 Ms. Carpenter. I have a few questions.

15 I guess my first is for Mr. Phillips. What is she
16 going to add that you're not going to get from Mr. Burke,
17 because it sounds like she basically did what he advised.

18 MR. PHILLIPS: We don't know that, and we'll never
19 know because I understand the government's not going to produce
20 Mr. Burke. His communications between him and Ms. Carpenter,
21 if I have the name right -- I think Burke is the attorney.

22 THE COURT: I thought the government was producing
23 Burke.

24 MS. BRETZ: For deposition, we are.

25 MR. PHILLIPS: Oh, okay. Ms. Carpenter is the

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1 ultimate decision-maker, as your Honor just said.

2 THE COURT: Right, but aren't I reviewing -- I mean,
3 I understand you're saying that her -- you're not seeking to
4 depose her about your claim but about the defendants'
5 counterclaim; and the counterclaim is that the refusal was
6 unreasonable, but what do I care about her opinion? Don't I
7 look at the facts and decide what was or was not reasonable?

8 What's she going to add?

9 MR. PHILLIPS: I think ultimately you do, your Honor.
10 And I think it's going to be hard for the government to get to
11 unreasonable on a condition which itself thought that was
12 something that it could meet us halfway on, but the actual --

13 THE COURT: Let me interrupt you, because I notice
14 this theme throughout your letters, and I do disagree on one
15 thing. You, a number of times, said the question is whether
16 the conditions that you proposed were reasonable, and I don't
17 think that's the issue.

18 I think the issue is whether your refusal to admit
19 them was reasonable, and those are not unrelated, but they're
20 also not the same thing. It could be that your position was
21 reasonable and the government's position was reasonable, and
22 just because your position was reasonable doesn't mean that
23 your refusal to accede to their position was reasonable.

24 So, I do think this case is not about whether the
25 conditions you proposed were reasonable. I think the case is

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1 about whether your refusal to let them in on the conditions
2 they proposed was reasonable. So, I think we need to keep that
3 in mind.

4 I'm not saying that the conditions you proposed are
5 irrelevant, but your conditions could be the -- it could be
6 super reasonable, but if theirs are also reasonable, then that
7 makes the refusal unreasonable conceivably. So, it's not just
8 a matter of whether your position was reasonable.

9 You don't necessarily win if your position was
10 reasonable. If their position was reasonable as well and you
11 refused, then maybe your refusal was unreasonable, even though
12 your conditions were reasonable, so you need to keep that
13 distinction in mind.

14 MR. PHILLIPS: I appreciate that.

15 So, to answer your earlier question about
16 Ms. Carpenter, the answer is, if she's the decision-maker and
17 if she's the one that is receiving information, processing it
18 and ultimately deciding, no, what Cannistra is asking for is
19 unreasonable, tell them no, I'd like to be able to inquire as
20 to what her thought process was.

21 THE COURT: What are you going to do with that
22 information?

23 MR. PHILLIPS: I'm going to show, I believe, that her
24 conclusion was flawed, that it was arbitrary, that she
25 didn't -- I don't really know until I have the opportunity to

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1 ask her questions and other witnesses questions.

2 THE COURT: Let's say her reasoning was flawed. Why
3 do you need to know her actual reasoning? Why isn't the
4 question just, Here are the facts, Judge, you decide what was
5 reasonable.

6 MR. PHILLIPS: We might get to the point where we
7 both, the government and the plaintiff, present maybe
8 cross-motions for summary judgment. We put all the facts
9 forward and we ask your Honor to decide, based on all of the
10 inputs here, all of the concerns that were expressed, what's
11 the outcome.

12 But I'd also like to be able to inquire as to the
13 decision-maker, what did you consider, what was important to
14 you, why was this important, but something else, some other
15 consideration wasn't.

16 THE COURT: Well, let me ask Ms. Bretz.

17 If the question is whether the refusal of the
18 defendants was unreasonable, why isn't it relevant what the
19 reasons were -- what the EPA's reasons were for not accepting
20 the conditions that plaintiff put off access?

21 MS. BRETZ: I think the two issues that your Honor
22 previously raised and part of what Mr. Phillips said, the
23 actual reasoning of Ms. Carpenter is an APA question. To the
24 extent they're looking to determine whether or not her
25 reasoning was arbitrary and capricious, that's APA, it's record

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1 review, it's pretty standard.

2 She did not make a determination as to Cannistra's
3 unreasonableness. What Ms. Carpenter did that is for the Court
4 to decide, whether they were unreasonable in their actions.
5 Ms. Carpenter issued an order, she determined it was proper.
6 She heard objections to the order, which may be similar and
7 going to what is ultimately decided to be reasonable or
8 unreasonable, but what her job was to do, was to decide whether
9 the order was validly issued, notwithstanding the conditions
10 presented.

11 It's not -- her thinking as to that point is not
12 relevant. She didn't make a determination as to
13 reasonableness; she determined that the order was properly
14 issued and valid and it stood.

15 THE COURT: Didn't she, after she issued the order,
16 didn't the lawyer, Mr. Burke, go back to her and say, Look,
17 plaintiff wants this, this and this, and she said, I'm not
18 modifying my order.

19 MS. BRETZ: Exactly. In determining -- she
20 considered their objections in determining that the order, as
21 it was priorly -- as it had been issued was still valid.

22 THE COURT: So, she essentially concluded that the
23 restrictions that the plaintiff wanted were unreasonable and
24 that EPA wasn't entitled to go ahead.

25 Isn't the plaintiff entitled to know her thinking so

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1 that they can defend against your counterclaim? Your
2 counterclaim is plaintiffs were unreasonable for the following
3 reasons. Aren't they entitled to know what those reasons are?

4 MS. BRETZ: I'm not sure it's fair to characterize
5 her decision as to say she made a determination as to their
6 unreasonableness. Her job was to determine whether EPA's order
7 was valid and whether it authorized access. She looked under
8 the statute. She determined it was valid, and it was. She
9 didn't necessarily -- I don't want to speak on her behalf, but
10 her job wasn't to determine whether they were being
11 unreasonable. It was to determine whether the order was
12 properly issued.

13 THE COURT: Right, but she decided that the issues
14 they raised didn't suffice to modify the order. So, your
15 counterclaim is that they unreasonably prevented -- refused
16 access, and part of your argument is that they did that by
17 putting unreasonable conditions on access.

18 And is there any relevance to the actual reasoning of
19 the decision-makers on that subject, or is your counterclaim
20 like the APA claim where I just look at the record and
21 essentially make the decision myself?

22 MS. BRETZ: I think what's perhaps a confusing point,
23 it's not whether the conditions were unreasonable. It's
24 whether they unreasonably failed to comply. That's the
25 language in the statute. And their unreasonable failure to

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1 comply is what the Court makes a determination on.

2 THE COURT: Right. And that's a distinction I made
3 before, but isn't there some relevance to whether their refusal
4 was reasonable? Isn't it relevant to that question, whether
5 the conditions they were placing were unreasonable?

6 For example, if you have an access order and they
7 say, Look, we're going to refuse to comply unless all the
8 workers wear football helmets -- well, that's not such a crazy
9 thing. Let's say unless all the workers wear a tutu. That's
10 obviously ridiculous. And obviously, the refusal in those
11 circumstances is unreasonable and that would be a really good
12 fact for you. They put an absurd condition and therefore,
13 their refusal was unreasonable.

14 Likewise, if they made the condition, Sure, you can
15 come in, but don't block our driveway, that's a reasonable
16 condition. And if -- you might argue that if EPA wouldn't
17 agree to that, that their refusal was reasonable. This is
18 going to be somewhere in the middle, I imagine, but don't I
19 need to know -- I guess my question comes down to, is the EPA's
20 actual thinking on that subject relevant or, like the APA
21 decision, am I to look at these facts *de novo* and just make my
22 own decision as to whether the refusal was unreasonable?

23 MS. BRETZ: It seems to me the latter, your Honor.
24 It also is worth mentioning that the terms of conditions placed
25 by Cannistra were discussed and are fully documented in the

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1 record, and that also goes to the question of why
2 Ms. Carpenter's thinking on this subject is just not relevant
3 or proper because it is all documented there.

4 What is -- indeed, if there's -- there's not much
5 case law on this because typically people don't refuse access,
6 it's not something that's come up for EPA nearly at all, so
7 there's not that much case law. The few cases we found, one of
8 them cited to your Honor, *Ponderosa*, it makes clear that
9 whether or not someone is being unreasonable has nothing to do
10 with their subjective belief. Good-faith belief does come into
11 account when you consider the amount of penalties, and that's
12 why some discovery we do believe is warranted here. But
13 whether or not the subjective beliefs of what you're doing is
14 reasonable is not actually relevant to the unreasonableness
15 inquiry.

16 THE COURT: Is the subjective belief of the EPA
17 decision-makers relevant?

18 MS. BRETZ: I don't believe -- not on that question,
19 your Honor.

20 THE COURT: Just out of curiosity, what's the
21 standard I should apply for whether a refusal is reasonable?
22 Is it just whatever I think in my sense of fairness or is there
23 some content to that standard?

24 MS. BRETZ: The case law has not been as instructive
25 as I have preferred. Some courts do seem to just generally

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1 consider an overall approach to looking at the factors at play.
2 *Ponderosa* quotes another case in which there were found to be
3 reasonable conditions placed and there was the destruction that
4 had happened, making it virtually impossible; it was found to
5 be reasonable there.

6 Barring that, we have not found a case where it's
7 been reasonable to prevent conditions of access when EPA
8 validly has a valid order.

9 THE COURT: Well, this is what I think. I think
10 her testimony will be of only marginal value to what I have to
11 decide. And plaintiffs are going to get access to the people
12 who really were more directly involved in the decision. I
13 don't mean any disrespect by saying that Ms. Carpenter, it
14 looks like, was essentially just backing up Mr. Burke. So, it
15 seems to me that the plaintiffs ought to take the government up
16 on the opportunity to depose him and -- was there one other
17 person.

18 MS. BRETZ: Dan Gaughan is also being offered. He's
19 the site property manager who was there the whole time, and
20 he's also an EPA employee.

21 THE COURT: If, after you talk to Burke, you can come
22 back with something more concrete that you need to ask
23 Ms. Carpenter, you can give it a shot, but at this point, I
24 don't think really that her reasoning is going to be very
25 helpful.

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1 If she says, Well, I thought that they were
2 unreasonable for these six reasons, I don't really need to know
3 that. The government is going to, at summary judgment or trial
4 or whatever, make its arguments about whether her reasons --
5 she thinks the refusal was unreasonable. Whether they're the
6 same as the ones Ms. Carpenter actually had in mind, I don't
7 think is going to make a difference. The question is, do I
8 think it's reasonable. So, no deposition of Carpenter, at
9 least at this point.

10 Yes, Mr. Phillips.

11 MR. PHILLIPS: I understand your Honor's ruling.

12 With respect to knowing on what basis the government
13 is going to claim that our position, our refusal to agree to
14 allow them access on their conditions was unreasonable, I don't
15 want to have to wait until summary judgment or trial to know
16 that. I'd like to have a witness, maybe it's a 30(b)(6)
17 witness, and this is something that I raised with the
18 government earlier on, but I'd like to have a witness who is
19 going to speak for the EPA and the government and tell me what
20 their position is. What was it? Because, in my view, it all
21 came down to the nonbusiness hours in the end.

22 There was a lot of water over the dam, over the year
23 or so that Cannistra and the EPA were conferring over this, and
24 I don't agree that there ever was a denial of access. There
25 was a back and forth that continued for an extended period of

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1 time.

2 THE COURT: Then you brought the lawsuit.

3 MR. PHILLIPS: We got to the issue first of the
4 administrative order that got issued, and we had an issue with
5 that, and we did the meet-and-confer with Mr. Burke, and then
6 the lawsuit.

7 THE COURT: Well, look. Mr. Burke is going to be
8 able to tell you what his reasoning is, but, frankly, if
9 Ms. Bretz comes up with another reason or ten reasons that
10 Mr. Burke and Ms. Carpenter never thought of, can I consider
11 them?

12 MR. PHILLIPS: Your Honor hears all types of cases
13 where there's a decision-maker. In an employment case, a
14 decision-maker makes the decision. And if I'm the plaintiff, I
15 want to know what the inputs were, what the reasons were for
16 the decision. I don't want --

17 THE COURT: Right, but the question isn't whether
18 their decision was reasonable; it was whether the refusal, if
19 one occurred, was reasonable. So, I'm not so sure the
20 subjective beliefs of the decision-makers on the government's
21 side is all that important, but you're going to get that from
22 Burke. You can propound an interrogatory when the time comes.
23 And I'm sure you can have a conversation with Ms. Bretz.

24 I've got to imagine, from your participation in the
25 negotiations, you have some idea of why they thought your

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1 conditions went too far. The fact that eventually both sides
2 compromised I don't think shows that either side's initial
3 position was unreasonable.

4 But again, the issue isn't whether either side's
5 initial position was unreasonable. The issue is whether the
6 refusal, if they can show one occurred, was unreasonable.

7 It could be, as I said, that what you are asking for
8 was reasonable, but their refusal was reasonable, and -- their
9 decision not to agree with that condition was also reasonable.
10 And that doesn't really answer the question whether the refusal
11 of access was reasonable.

12 We do need to remember, they were trying to go in and
13 look for radioactive stuff. There is a public interest in
14 that. So, this is not a normal commercial negotiation where
15 we're all trying to get the most we can out of a business deal.
16 So, the law does give them some pretty strong coercive powers
17 for good reasons, which is why I really am going to ask you
18 again, let's go off the record.

19 (Off the record discussion was had)

20 THE COURT: Back on the record.

21 We've had a discussion off the record. I'm
22 encouraging the parties to try to work it out. They're going
23 to talk some more and let me know if getting a magistrate judge
24 or a mediator involved makes sense.

25 But in the meantime, we also have the second issue,

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1 which is the plaintiff's subpoenas to Mr. Scagnelli's clients.
2 First of all, what is it that you think that you will get from
3 the depositions of the people who did the work onsite that will
4 be helpful or relevant?

5 MR. PHILLIPS: Essentially, three categories of
6 inquiry, your Honor. The first is what the contractors have
7 done for the EPA and other similar sites. So, for example, if
8 these contractors have experience working nonbusiness hours,
9 we'd like to know that, when, where did that happen and what
10 were the circumstances.

11 The second, what did the EPA actually explore with
12 these contractors in terms of working off-hours at this
13 particular site? So, I've started to go through the document
14 production that the government made last week. We got it on
15 Monday, and I'm already seeing some correspondence with these
16 contractors along the lines of Cannistra's asked for proof of
17 insurance. Can you provide that? Yes. Here's a certificate.
18 So, that's the kind of discourse I'd like to see, but more
19 specifically with respect to the nonbusiness hours issue.

20 Finally, I'd like to ask the subcontractors, okay,
21 you were there Sunday, which was not completely an off day.
22 Part of the dealership is still open, but it's mostly -- the
23 service department is closed. It's a much quieter day for the
24 dealership. What was your experience like on Sunday? Was it
25 easy to navigate the site? Were there issues? Were there

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1 conflicts?

2 What happened on Monday when everything is ramped up
3 and going full tilt? Were there issues with cars in any way?

4 I'd like to actually hear what they have to say so we
5 can know in hindsight were there concerns that Cannistra was
6 expressing about the cramped conditions and potential for
7 disruption. Were they legitimate? Were they well-founded?

8 THE COURT: How is that relevant, because none of
9 that information was known to decisions-makers at the time.

10 MR. PHILLIPS: I think the first two buckets
11 certainly are relevant. The third was -- I understand your
12 Honor's point, but I think to use your -- the helmet example or
13 costume example, I think the proof was in the pudding. So, if
14 it turns out, yeah, it really was difficult -- I give your
15 Honor an example.

16 This was an area where they did drilling on -- either
17 Monday or Tuesday, and/or wanted to do drilling on one of
18 those, and they did it the Sunday, and on Sunday, there were no
19 cars in that spot. On Monday, it was full.

20 So, it's an example of the type of condition that I
21 believe corroborates and confirms what we were saying, that
22 this is going to become very difficult and there's going to be
23 a potential for conflict. If you do this job, regular business
24 hours, when the dealership is going full-tilt versus a Sunday
25 or after-hours in the evening.

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1 THE COURT: Why isn't that relevant, Ms. Bretz?

2 MS. BRETZ: I think there's a few points. Again,
3 we're looking here at whether Cannistra's actions were
4 reasonable, and their actions is their failure to comply with
5 the order and -- failure to comply with the order. That's the
6 language of the statute.

7 First of all, what contractors and EPA workers have
8 done on other sites is not relevant. Every site is different
9 and has to be evaluated differently. EPA is not denying and
10 would not deny the fact that they work at night.

11 In fact, one of the cases -- one of the main
12 unreasonable access order cases was because EPA was trying to
13 work for 24 hours during the day, and the property owner found
14 that to be a burden and unreasonable.

15 Contractors, especially like ones like Weston and
16 ones in APA workers, are trained to work at night in
17 emergencies. There's consensus. There's no denial of that.
18 It's the fact that in this property, it wasn't warranted.

19 So, it's not -- I'm not sure what they hope to get
20 from the contractors themselves that is not already
21 well-documented in the record or that Dan Gaughan, who is the
22 property manager, and who has been on this case from the very
23 beginning when EPA and Cannistra were negotiating the access,
24 he can certainly testify to all of that.

25 THE COURT: That relates to whether EPA has given

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1 accommodations like what plaintiff asked for in other sites.
2 What about the plaintiff's desire to find out from the horse's
3 mouth whether their demands could have been accommodated as
4 opposed to finding out -- their communications with EPA, not
5 with Weston. What about their desire to find out from Weston
6 if they could have been accommodated?

7 MS. BRETZ: You're asking if they asked Weston
8 employees can you work at night or could you have worked at
9 night?

10 THE COURT: Mr. Phillips says the second thing he
11 wants to explore is the extent to which EPA explored with
12 Weston whether the accommodations that plaintiff was looking
13 for could be accomplished.

14 MS. BRETZ: I think we're just straying so far from
15 the actual question here, which is whether Cannistra's actions
16 in denying access were unreasonable. Whether EPA looked into
17 various different options, I'm not sure that that's (a)
18 relevant, and (b), as documented in the record, EPA does try to
19 accommodate property owners, and that's shown here.

20 There was month's long negotiations of trying to
21 figure out when they could come, figuring out -- EPA has
22 policies about when they come onto properties and when they
23 don't.

24 THE COURT: Let's say -- I'm sure this isn't the
25 case, but let's say plaintiff said to EPA, could you do this

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1 work at night. And EPA asked Weston, could you do this work at
2 night and Weston said, sure, absolutely, no problem, we'll get
3 it done on the same budget and in the same period of time doing
4 all the work when the place is closed. If that were the case,
5 and I'm sure it's not, wouldn't that make the requested
6 condition a reasonable one and therefore, make it a stronger
7 case for the defense that their refusal was reasonable?

8 MS. BRETZ: I don't think it would.

9 I mean, if that was the case -- again, every property
10 is different. So there's a whole set of considerations that
11 EPA looks at when determining when they come into a property
12 and how they come into the property, the rates of the
13 contractors that are used. It's not as simple as saying, Can
14 you reach out to Weston to ask if they can come at night.
15 That's putting a burden on EPA. I think that's not warranted
16 here.

17 THE COURT: Well, the question is, is their refusal
18 reasonable? And if, in fact, their refusal -- the EPA's order
19 was outrageous because there was no reason whatsoever not to
20 accommodate the request, that would make the refusal arguably,
21 in hindsight anyway, anyway, more reasonable, I would think.

22 If -- again, I'm sure this didn't happen because you
23 made representations that it didn't happen, but if the truth
24 is, you know, all these requests by the plaintiff were totally
25 easy to accommodate and would have caused no harm whatsoever to

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1 the mission, and EPA just refused because they were in a bad
2 mood, that would be helpful to the plaintiff in showing that it
3 did not act unreasonably.

4 MS. BRETZ: I guess I'm not sure how the testimony of
5 all of these contractors who actually did the work on the site,
6 they were the ones doing the drilling, the bugging. I'm not
7 sure how that casts a light on whether or not Cannistra's
8 actions were reasonable or unreasonable.

9 THE COURT: And what about the testimony that
10 plaintiff wants, where, presumably, these witnesses would say
11 some of our work was done more easily on Sunday when the
12 service department was closed than it was on Monday when
13 everything was open?

14 MS. BRETZ: Again, I'm just not sure that's relevant.
15 EPA has never said it would be not -- it would be a piece of
16 cake to do this work and very -- only when it's not busy at the
17 property. EPA was aware it might be busy and its contractors
18 are trained to do work when it's busy.

19 So, I'm not sure how that sheds light on the
20 reasonableness or unreasonableness. Even if they told us it
21 was going to be busy, which they did, and we acknowledged the
22 fact that it was then busy on certain days, I don't see how
23 that shows when they unreasonably denied access.

24 Just because something did ultimately come to pass
25 that they said came to pass, that doesn't mean that the request

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1 was -- or that the denial of access was reasonable or
2 unreasonable in any event.

3 THE COURT: Well, let's say the workers would say
4 that the, as it played out, the place being open on Monday made
5 absolutely no difference and the claims that the plaintiff made
6 about how this had to be done at night or when the dealership
7 was closed are complete garbage because we had no problem
8 whatsoever, would that be something you would use to show the
9 refusal was unreasonable? And if so, why couldn't the
10 plaintiff use it to show that the refusal --

11 MS. BRETZ: I'm not honestly sure it would because it
12 goes to whether or not their objections that they posed for a
13 year and-a-half, whether those were reasonable and their
14 ultimate denial of access. What ultimately ended up happening
15 once we got access, it doesn't shed light on their beliefs.

16 MR. PHILLIPS: The first part of this argument
17 started off as we have an administrative record that we can
18 look at in terms of the reasonableness of what happened and now
19 we're getting into the issue of discovery. And the government
20 is going to depose my clients, the two principals of Cannistra.
21 They're going to depose the general manager of Tesla.

22 The questions that the government is going to ask at
23 those depositions are going to be a lot like the hypotheticals
24 that your Honor just posed, right? Why else is the government
25 deposing those witnesses? So, they're trying to have it both

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1 ways.

2 They're trying to make me drink through a straw and
3 not get from the contractors and get it from the horse's mouth,
4 yet they're going to go ask the same questions of my clients
5 and Tesla.

6 THE COURT: Are you going to ask them about what
7 actually happened or just about what their thinking was?

8 MS. BRETZ: I think part of the distinction here is
9 (a) we focus on when you look at the good-faith belief, you
10 look at Cannistra's actions, and that's when it comes into
11 play, in the penalty context, not in whether or not the denial
12 was reasonable.

13 So, it is true, you look at a good-faith or bad-faith
14 belief when you are asking how much the penalty should be set
15 for, but to that end, it doesn't go to EPA's good-faith belief;
16 it goes to Cannistra's good-faith belief, which is why the
17 depositions of the Cannistras are relevant to that question
18 whether they had a good-faith belief.

19 THE COURT: My question is, in exploring that issue,
20 are you going to be asking them about what actually happened
21 when EPA was onsite?

22 MS. BRETZ: I haven't written my deposition outline,
23 but I don't think so. I think it's a question of when they
24 were asserting these conditions, what was their belief at that
25 time?

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1 THE COURT: All right. I think the second category
2 that Mr. Phillips is interested in is on point because, to wit,
3 what -- to what extent were the requests that plaintiff was
4 making reasonable or not. I don't think that what this
5 contractor has done for EPA at other sites is relevant, even if
6 EPA treated other sites more generously, that doesn't make what
7 it did here reasonable or unreasonable.

8 And I think the actual experience of what happened
9 doesn't really go to anything that's at issue, which is what
10 people reasonably believed about what was going to happen. And
11 I'm not sure the workers are the ones who can shed any light on
12 the second issue, which is communications between EPA and
13 Weston about the possibilities of accommodating the plaintiff's
14 request.

15 Now I gather you have gotten some information from
16 EPA on that which you haven't finished going through. It's
17 hard to imagine that there will be anything on the Weston end
18 that you didn't get on the EPA end, but if you have reason to
19 think you might, then you can subpoena them for documents; and
20 if you need to, at some point, a 30(b)(6) witness, but
21 hopefully, you'll decide that's not worth the time.

22 But the guys and gals who were actually onsite doing
23 the work, I don't think really are going to shed light on the
24 good or bad faith of either side during these negotiations, and
25 you certainly don't need seven of them. Even if there was

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1 something relevant, it seems like the boss would be enough.

2 And the government is making available its person onsite.

3 If you have some reason to believe that somebody from
4 the contractor would say something different, you can raise it,
5 but at this point, I don't think the depositions of the
6 subcontractor, or actually the contractor or the subcontractor
7 workers, is warranted.

8 And I should say, in all these decisions, I'm doing
9 what Rule 26 tells me to do, which is, I am considering
10 relevance and proportionality to the needs of the case,
11 considering the importance of the issues of safety, the amount
12 in controversy, the party's relative access to the relevant
13 information, resources, etc., all that stuff in Rule 26(b)(1).

14 And honestly, since this issue on the counterclaim
15 really comes down -- and on the issue of what the penalty
16 should be, if anything -- it comes down to what people were
17 thinking in good faith at the time, how it actually played out,
18 which I imagine is going to be pretty consistent with the
19 parties' expectations. It just seems to be the tiniest of
20 tails that shouldn't wag the dog.

21 So, I will quash those subpoenas of the workers, but
22 plaintiff can subpoena those companies for documents if, after
23 reviewing the EPA's production, there's something that you
24 think you legitimately need.

25 MS. BRETZ: Can I ask for one point of clarification.

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1 THE COURT: Yes.

2 MS. BRETZ: It's a bit confusing because there were
3 two EPA employees, three contractors and two subcontractors,
4 all workers at the site. I just want to be clear that the
5 category that you -- applies to all of them.

6 THE COURT: I meant all workers.

7 MS. BRETZ: Yes.

8 THE COURT: I didn't realize there were actual
9 boots-on-the-ground workers who were EPA employees. I guess
10 that was in your letter.

11 MS. BRETZ: Thank you.

12 THE COURT: No deposition for workers, but you --
13 again, you can subpoena the contractors if need be, but
14 hopefully you're going to work something out on this.

15 I've just got to think. I don't like to take bread
16 out of your mouth, but doing the math, that your clients may
17 decide that it's just not a good business decision to fight
18 this because you know the government. It's not costing them
19 anything to fight it.

20 MR. PHILLIPS: Understood. Your Honor, we did
21 subpoena documents and -- in our subpoenas and you'd --

22 THE COURT: Yes. And you said in your letter that
23 you hadn't had the opportunity to talk about narrowing it.

24 MR. PHILLIPS: My only request is that if it turns
25 out that there is some follow-up document production that we'd

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1 like to explore with the contractors, that I have not have to
2 go through the exercise of serving another round of document
3 subpoenas.

4 If you quash the subpoena, then, arguably, I'd have
5 to do that.

6 THE COURT: How about the document subpoena is merely
7 stayed?

8 MR. PHILLIPS: I'd appreciate that.

9 THE COURT: Does that work?

10 MR. SCAGNELLI: And you can talk to our office in EPA
11 about the scope of what you would be looking for in that
12 instance and we'll work with you.

13 MR. PHILLIPS: Thank you.

14 THE COURT: All right. Anything else we should do
15 this morning?

16 MS. BRETZ: Not from the government.

17 MR. SCAGNELLI: Not from my end. I have nothing to
18 say in light of your decision.

19 THE COURT: Maybe we should appoint you as the
20 mediator. That would probably be a bad idea, but I'll keep you
21 in mind for other cases.

22 MR. SCAGNELLI: Thank you.

23 MR. PHILLIPS: Thank you.

24 (Adjourned)